



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*86 Chambers Street
New York, New York 10007*

May 23, 2025

By ECF

The Honorable Denise L. Cote
United States District Judge
United States Courthouse
500 Pearl St.
New York, NY 10007

Re: *Am. Fed'n of Gov't Emps., AFL-CIO, et al. v. U.S. Office of Personnel Mgmt., et al.*, No. 25 Civ. 1237 (DLC)

Dear Judge Cote:

This Office represents the Defendants in the above-referenced case. Pursuant to the Court's order (ECF No. 106), we write to inform the Court that Defendants will make Greg Hogan available for cross-examination at the hearing scheduled for May 29, 2025, via remote means (Microsoft Teams or another service of the Court's choosing). Defendants have conferred with Plaintiffs' counsel and advised them of same, and Plaintiffs advised that they consent to Mr. Hogan's appearance via remote means.

In a call with Plaintiffs' counsel today, Defendants requested that Plaintiffs' counsel agree that their cross-examination of Mr. Hogan will be confined to the subject matter of his declarations (and matters affecting his credibility), to which Plaintiffs' counsel agreed. Defendants also requested that Plaintiffs' counsel agree to a temporal limit for their questioning (*e.g.*, no more than 45 minutes), given that Mr. Hogan must also attend to his other official duties; however, Plaintiffs' counsel would not agree to any time limit on their questioning.

Defendants further requested that Plaintiffs' counsel provide a proffer of the topics they intend to explore with Mr. Hogan to allow Defendants to determine whether any proposed questioning would implicate the deliberative process privilege. Plaintiffs' counsel declined to provide a proffer, but they noted that they may very well question him on subjects that implicate the deliberative process privilege. Given the unique nature of objecting to questioning on the basis of deliberative process privilege in this context, and the need to preserve any such issues for appeal, Defendants believe a court conference would be useful to discuss the proper procedure for such objections.

Defendants also advised Plaintiffs' counsel that Defendants intend to cross-examine Plaintiffs' three expert witnesses at the upcoming hearing: Ann Lewis, David Nesting, and Bruce Schneier. Plaintiffs do not consent to making these witnesses available at the May 29 hearing and contend that Defendants have waived their right to cross-examine these witnesses at the hearing.

Plaintiffs' counsel would not say whether the witnesses were otherwise unavailable (either in person or via remote means) for cross-examination at the hearing on May 29. As noted in the parties' May 14 joint letter, Defendants specifically reserved the right to cross-examine these witnesses, in the event that Plaintiffs insisted on cross-examining Mr. Hogan. *See* ECF No. 92 at 1 ("Defendants reserve their right to [cross-examine Plaintiffs' witnesses] if the Plaintiffs seek to cross examine Defendants' forthcoming declarants."). Defendants incorporated their position from this letter in the parties' May 21 joint letter to the Court. *See* ECF No. 105, at 3 n.1. Defendants have abided by the Court's Order requiring them to confer and advise the Court prior to May 27 as to whether any witnesses should be present at the hearing to be cross-examined. *See* ECF No. 90.¹ To the extent any of Plaintiffs' expert witnesses are not available on May 29 for cross-examination, Defendants are amenable to adjourning or continuing the hearing to accommodate their witnesses' schedules.

Given the above, Defendants respectfully request a conference with the Court prior to the May 29 hearing to determine the logistics for and parameters of Mr. Hogan's cross-examination and to discuss their request to cross-examine Plaintiffs' expert witnesses.

We thank the Court for its consideration of this request.

Respectfully submitted,

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cc: Plaintiffs' counsel (by ECF)

¹ Defendants do not believe that they waived their right to cross-examine Plaintiffs' expert witnesses. However, to the extent the Court believes they did so, *cf.* ECF No. 106, Defendants respectfully request leave to cross-examine these witnesses at the May 29 hearing.